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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977

No. 77-1327

LAKE COUNTRY ESTATES, INC., a corporation, COUNTRY CLUB ESTATES, a partnership, and BOULDIN DEVELOPMENT CORPORATION, a corporation,
Petitioners,

vs.

TAHOE REGIONAL PLANNING AGENCY, COUNTY OF EL DORADO, and STATE OF CALIFORNIA, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF CERTAIN RESPONDENTS IN OPPOSITION TO PETITION

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METHOD OF CITATION

For ease of reference herein, the above-named respondents adopt the reference system utilized by petitioners in their Petition and the following additional references:

TRPA	—	Defendant-Respondent Tahoe Regional Planning Agency
Petitioners	—	Lake Country Estates, Country Club Estates, and Bouldin Development Corporation, and each of them
States	—	The State of California and the State of Nevada
R.	—	Record on Appeal (e.g., R. 7:19-21 means Record, page 7, lines 19 to 21)
Ordinance	—	TRPA *Land Use Ordinance*
Compact	—	Tahoe Regional Planning Compact [Act of December 18, 1969, Public Law 91-148, 83 Stat. 360]
Individual Defendants	—	All of the respondents above-named, excluding TRPA, and James Henry, William Briner and Norman B. Livermore
Petition	—	Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit herein

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OPINIONS BELOW

The opinions of the lower courts are adequately referenced in the Petition.

JURISDICTION

The jurisdictional statement set forth in the Petition is accurate.

QUESTIONS PRESENTED

1. Does the Eleventh Amendment provide immunity from suit in federal district court to TRPA, a compact created governmental entity performing environmental and land use planning functions in portions of two states with membership composed of an equal number of representatives from each state and one federal representative?

2. Does TRPA, a bi-state agency created by interstate compact, lose Eleventh Amendment immunity when the compact creating it terms it a political subdivision of *both* states for venue purposes?

3. Do members of the governing body of TRPA, composed of five (5) members from each state and one federal representative, with jurisdiction over portions of two states, have absolute immunity from damage claims allegedly arising from their legislative acts?

STATUTES INVOLVED

The Petition adequately references the pertinent statutes.

STATEMENT OF THE CASE

TRPA was created in 1969 by Congressional ratification of the proposed compact between the States of California and Nevada [Act of December 18, 1969, Public Law 91-148, 83 Stat. 360]. The Compact invests TRPA with jurisdiction over the watershed area of the Lake Tahoe Basin, a basin encompassing portions of both states [Article II(a), Compact].

Because of deficiencies in environmental control and governmental effectiveness in the Lake Tahoe Basin, TRPA was created with Compact goals of "resource conservation and orderly development" [Article I(b) and (c), Compact; 115 Cong. Rec. 33068-33069; and Footnotes 1, 2, 3, and 16 of *Younger v. County of El Dorado*, 5 Cal. 3d 480, 487 P. 2d 1193 (1971)]. TRPA was designed to provide the "coordinated planning, conservation and resource development essential to accommodate a growing population within the Region's relatively small area without destroying the environment". *Younger v. County of El Dorado, supra*, 5 Cal. 3d at 488.

The Compact requires TRPA to adopt a regional plan within fifteen months after its formation, which plan must include at least the following correlated elements:

(i) An integrated land use plan for the entire Region;

(ii) An integrated transportation plan dealing with all modes of transportation and pertinent facilities;

(iii) A conservation plan for the preservation and management of the scenic and other natural resources of the Region;

(iv) A recreation plan for the development, utilization and management of recreational resources within the Region; and

(v) A public services and facilities plan.
[Article V(b), Compact].

TRPA is empowered to consider, adopt, and enforce said Plan and "all necessary ordinances, rules, regulations and policies to effectuate the adopted Regional Plan" on a broad spectrum of subjects including: water quality, air pollution, watershed protection, flood plain protection, soil and sedimentation control, sewage disposal, zoning, subdivision, grading, water related developments, and review of public works projects [Article VI(a), (c) and (d), Compact].

Although created as a "separate legal entity" [Article III(a), Compact], the governing body formed to carry out the mandates of the Compact is divided equally between the two states (five from each) plus one appointee of the President of the United States [Article III(a) and § 3, Compact]. The five governing body members from each state are each composed of three elected officials of each of the local governments of each state and two representatives of each state government [Article III(a), Compact].

The Compact requires local governments within the Region to pay no more than $150,000.00 of TRPA's funding [Compact, Article VII]. In accordance with the Compact authorization for TRPA to obtain financing from other sources [Article VII, Compact], most of TRPA's funding comes from state and federal sources and application fees.

Article VI(b) of the Compact requires TRPA and all other state and local governments within the Region to enforce TRPA regulations. Jurisdiction over such suits is vested in state courts. The third sentence

of Article VI(b) provides venue provisions for such actions "unless the action is brought in a federal court". "For this purpose, the Agency shall be deemed a political subdivision of *both* the State of California and the State of Nevada" [last sentence of Compact, Article VI(b); emphasis supplied].

Petitioners are the owners of, or have an interest in, real property within the Region which is subject to TRPA's jurisdiction [R. 112:1-13; R. 116:26-30].

Pursuant to Compact requirements [Articles V(c)(5) and VI, Compact], TRPA adopted its Regional Plan on December 22, 1971 [R. 112:26 and R. 117:16] and *Land Use Ordinance* on February 10, 1972 [R. 112:26-29]. The Regional Plan classified a portion of petitioners' property "General Forest" and the remainder "Conservation Reserve" [R. 112:29-30; R. 113:1-2; and R. 117:16-18].

Desiring to develop their property inconsistent with TRPA's classifications, petitioners submitted a (self-proclaimed) vague [R. 380] master plan to TRPA which application was denied [R. 372-381].

TRPA *sua sponte* rezoned petitioners' land to Conservation Reserve permitting development in accordance with a comprehensive development proposal ("specific plan") and requested petitioners apply for specific plan approval [R. 380; R. 87; R. 113:11-15; and R. 117:27-118:1].

Rather than submit the specific plan solicited by TRPA, petitioners filed this suit, quickly concluding that TRPA's single refusal to approve *their* master

plan forever prohibited any use of land [R. 113:16-19; 118:2-5]. No development application other than the vague master proposal has ever been tendered by petitioners to TRPA [R. 113:24-28; 118: 10-13; 108-132].

TRPA has no authority to own or condemn property [Compact] and has never announced any intention to acquire all or any portion of petitioners' or anyone else's property.

On April 16, 1973, petitioners filed separate complaints in the United States District Court for the Eastern District of California and in the Superior Court of the State of California for the County of El Dorado against TRPA, El Dorado County, the States of California and Nevada, the then members of TRPA's governing body, and TRPA's then Executive Officer. On May 13, 1976, the state court action was dismissed and no appeal has been taken therefrom. The federal court action is the subject of this petition and, like the state court action, alleges that petitioners' property has been taken without just compensation and without due process of law, in violation of the Fifth and Fourteenth Amendments to the United States Constitution [R. 108, *et seq.*]. Jurisdiction of the District Court was invoked pursuant to 28 U.S.C. §§ 1331, 1343 and 2201 [*id.*].[1]

[1]Three (3) other cases were the subject of the opinion hereinbelow. Consistent with the Petition, we omit reference to the facts and issues therein because the parties in those separate actions have not timely petitioned this Court and all cases were the subject of separate judgments in both the District Courts and the Court of Appeals; Supreme Court Rules 21(4) and 23(5).

DISPOSITION BELOW

Pursuant to motions to dismiss, judgment of dismissal was entered by the District Court on December 16, 1975 [R. 634]. It found that although the complaint, under customary pleading rules, would be sufficient to state a cause of action in inverse condemnation, such a cause of action was not available against TRPA by virtue of its lack of condemnation powers. Accordingly, TRPA was dismissed. The District Court also dismissed the individual defendants on the grounds that they are immune from liability for damages.

Petitioners timely appealed. For purposes of oral argument only this case was consolidated with three other cases involving TRPA. On August 5, 1977, the Ninth Circuit Court of Appeals rendered its initial opinion herein.[2] By that opinion, the Ninth Circuit affirmed the District Court's determination that inverse condemnation and monetary relief are inappropriate against TRPA, that the individual defendants are absolutely immune from actions for damages arising from legislative acts and that all other defendants were appropriately dismissed. It reversed the District Court, however, on the propriety of declaratory and injunctive relief against TRPA, and remanded for factual development of whether the acts of the individual defendants were legislative or executive in nature.

[2]Since petitioners do not assert error in the dismissal of other parties defendant (i.e., the states and county), we do not discuss the lower court's grounds therefor nor do we hereinafter brief the propriety of those dismissals.

TRPA petitioned for rehearing. On December 21, 1977, the Court of Appeals withdrew its August 5, 1977 opinion and issued a second opinion in its place. The second opinion's only pertinent departure from the first opinion is it holds TRPA immune from suit.[3] TRPA's immunity from suit was premised on the Eleventh Amendment, an issue which had been briefed and argued in connection with the propriety of suit against the states. Consistent with its initial opinion regarding the Eleventh Amendment immunity of California and Nevada, the Ninth Circuit Court of Appeals held that TRPA was also immune from suit pursuant to the Eleventh Amendment. In doing so, it separately relied upon the opinion of this court in *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959) and upon the analysis of the Eighth Circuit opinion in *Petty* [254 F. 2d 857].

Petitioners' petition for rehearing was denied.

[3]Other changes were made in the second opinion. Although many of such changes were cosmetic and none are pertinent to the issues herein, in the interests of being comprehensive, such changes include: (i) *Jacobson* was dismissed for lack of standing; (ii) the discussion of pleading and procedural issues was condensed; (iii) the Court elaborated upon the grounds for dismissing the counties; (iv) the Court condensed its disposition of questions of state law; (v) all discussion of avoiding characterizing TRPA as "an arm of the state" was deleted; (vi) issues pertaining to the dismissal of the United States were rewritten; (vii) the Court expanded upon the guidelines given the District Court regarding the qualified immunity of the individual defendants; and (viii) substantial dictum in *Layton-Tahoe* was deleted.

SUMMARY OF ARGUMENT

THE REASONS PROFFERED FOR THIS COURT GRANTING CERTIORARI ARE SPURIOUS. AFFORDING TRPA IMMUNITY PURSUANT TO THE ELEVENTH AMENDMENT IS CONSISTENT WITH ALL APPLICABLE AUTHORITY. ABSOLUTE IMMUNITY FOR LEGISLATORS WITH JURISDICTION OVER AN AREA NOT SUBJECT TO THE CONTROL OF EITHER STATE COMPORTS WITH PRIOR DECISIONS OF THIS COURT AND CONFLICTS WITH NO OTHER AUTHORITY

Petitioners proffer two "significant" issues for this Court's consideration on certiorari. First, petitioners question the propriety of TRPA's Eleventh Amendment immunity from suit in federal court. Second, petitioners argue that absolute immunity for legislators acting over a region not subject to the control of the constituent states is improper.

To concede that these issues are significant to these litigants (and perhaps to the other three compact entities exercising environmental and land use powers') does not concede the significance of these issues as a general matter. Few issues are unimportant as between litigants.

The "great controversy" that petitioners find surrounding the incursion of 175 compacts during the nearly 200 years of the Compact Clause is belied by the 25 cases annotated in United States Code Service under the Compact Clause. To be sure, compacts are a valuable tool to solve important disputes between states such as boundaries, water apportionment, port authorities and subjects of intergovernmental coopera-

[4]64 Stat. 568 (1950); 75 Stat. 170 (1961); and 75 Stat. 170 (1954); and see, generally, Council of State Governments, *Interstate Compacts, 1783-1977*, pp. 19-21.

tion (e.g., child welfare and crime control). Zimmerman, *The Interstate Compact Since 1925*, pp. 3-4 and 9-29, and Council of State Governments, *Interstate Compacts, 1783-1977* (1977). However, the relatively small number and limited scope of compacts is evident from the cited texts. Petitioners' suggestion that compacts and the entities occasionally created thereby have become a pervasive and powerful force in the United States is sheer nonsense [*id.*].

Nearly every reported decision has either expressly held or assumed that compact entities are afforded Eleventh Amendment immunity from suit in federal court. *Trotman v. Palisades Interstate Park Commission*, 557 F. 2d 35, 38 (2d Cir. 1977); *Petty v. Tennessee-Missouri Bridge Commission*, 254 F. 2d 857, 859-860 (8th Cir. 1958), reversed on other grounds, 359 U.S. 275 (1959); *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959); *Powell v. Port Authority*, 34 F. Supp. 797 (D.N.J. 1940); and *Rao v. Port Authority*, 122 F. Supp. 595 (E.D.N.Y.) affirmed 222 F. 2d 362. The lone exception unearthed by petitioners is a District Court opinion by the same judge who was reversed on precisely the same issue by the Second Circuit in *Trotman*. Accordingly, and contrary to the assertions of petitioners, the opinion hereinbelow is in complete uniformity with all other decisions in holding the bistate TRPA immune pursuant to the Eleventh Amendment. Further, the very authority cited by petitioners and other applicable authority rejects petitioners' argument that such immunity has been waived by the Tahoe Regional Planning Compact.

Nor does the holding below that individual legislators acting on issues not subject to the control of any single state are absolutely immune for their acts contravene any authority of this Court or conflict with decisions from other circuits. Petitioners can conjure up such a conflict only by characterizing some of the acts of TRPA as affecting matters which can be construed as being of local rather than statewide or nationwide significance. Such argument conveniently overlooks the spectrum of TRPA's required activities and the interstate nature of its origins and acts. Further, a legislative body does not lose its immunity merely because the area of legislative concern may have "local" overtones.

The decision below comports with applicable authority and presents no issues sufficient to warrant this Court's exercise of its certiorari powers.

— —

ARGUMENT

1. ELEVENTH AMENDMENT IMMUNITY WAS APPROPRIATELY AFFORDED TRPA

A. The Opinion Below Precisely Corresponds With Prior Decisions Of This Court And All Other Circuits.

Relying upon this Court's decision in *Petty* and the rationale of the Eighth Circuit Court of Appeals in its opinion in *Petty*, the Court of Appeals held TRPA immune from suit pursuant to the Eleventh Amendment.

Although petitioners devote the majority of their brief to attacking such holding, they are unable to

cite any persuasive authority in which the identical result was not reached. So, with the exception of one District Court opinion, every case cited by petitioners found Eleventh Amendment immunity to exist for the compact agency. *Trotman v. Palisades Interstate Park Comm., supra; Petty v. Tennessee-Missouri Bridge Commission, supra* (8th Circuit opinion); *Petty v. Tennessee-Missouri Bridge Commission* (Supreme Court opinion); *Powell v. Port Authority, supra;* and *Rao v. Port Authority, supra.* Petitioners' hypothesized conflict between the opinion below and the opinions from other Circuits simply does not exist.

Petitioners accurately note that *one judge,* of all of the courts examining this issue, in denying a motion to dismiss declined to find Eleventh Amendment immunity for a compact entity. *Byram River v. Village of Port Chester*, 394 F. Supp. 618 (S.D.N.Y. 1975). That very same judge was, however, reversed on the identical issue in *Trotman v. Palisades Park Commission, supra.* Accordingly, the lone "conflict" with the decision herein is dubious authority at best.

Petitioners urge that this Court in *Petty* did not reach the question of the applicability of the Eleventh Amendment to the compact agency. Such contention would undoubtedly come as a shock to the concurring and dissenting Justices in *Petty.* Justice Frankfurter, joined by two other justices in dissent, concurred in what they understood to be "[t]he Court['s] acknowledg[ment of] the applicability of the provisions of the Eleventh Amendment to the Tennessee-Missouri

Bridge Commission", *id.*, 359 U.S. at 283. Three justices concurred in the result with the solitary reservation that:

> ". . . [W]e do not reach the question as to whether the Eleventh Amendment immunizes from suit agencies created by two or more states under state compacts which the Constitution requires to be approved by the Congress." *Id.*, 359 U.S. at 283.

Clearly, both the three dissenting justices and the three concurring justices read the majority opinion as determining that the Eleventh Amendment immunized the compact agency. Petitioners accurately point out that the majority opinion of Justice Douglas in *Petty* does use the phrase "assume *arguendo*" before its recitation of such immunity. The remainder of the sentence so stating is, however, noteworthy:

> ". . . [T]his suit *must be* considered as one against the States since this bi-state corporation *is* a joint or common agency of Tennessee and Missouri." *Id.* 359 U.S. at 279 [emphasis supplied].

Stronger language can hardly be envisioned for the Court having found Eleventh Amendment immunity. Further, the holding of *Petty* supports the conclusion that the majority opinion found Eleventh Amendment immunity proper. The majority finds that the immunity afforded by the Eleventh Amendment was waived by the actions of the states in accepting and acting upon a Congressional condition of approval construed as consenting to suit in federal court. There is no need for discussion of *waiver* of

Petitioners attack the opinion below for its "simplistic approach" in affording TRPA Eleventh Amendment immunity without indulging in the analysis and construction of the nature of TRPA as was done by the Eighth Circuit opinion in *Petty*.[5] Such criticism is misplaced. The opinion below, after analyzing and adopting the rationale of this Court in *Petty*, observes:

> "Moreover, even did we not consider ourselves bound by *Petty, we would still find immunity for the reasons set forth in the opinion of the Eighth Circuit.*" [Appendix A, p. 8; emphasis supplied.]

Accordingly, the Ninth Circuit relies on the very rationale that petitioners insist is indispensable to determine the applicability of the Eleventh Amendment to TRPA. Petitioners' criticism that such analysis must be contained in the opinion merely urges prolixity. This Court of Appeals has repeatedly been compelled to characterize and recharacterize the nature of the Tahoe Regional Planning Compact and TRPA in a variety of different contexts. *League to Save Lake Tahoe v. TRPA*, 507 F. 2d 517 (9th Cir. 1974) cert. den. 420 U.S. 974; *Younger v. TRPA*, 516 F. 2d 215 (9th Cir. 1975) cert. den. 423 U.S. 868; *League to Save Lake Tahoe v. B.J.K. Corp.*, 547 F. 2d 1072 (9th Cir. 1976); *League to Save Lake Tahoe v. TRPA*, 558 F. 2d 914 (9th Cir. 1977); and *California Tahoe Regional Planning*

[5] Petitioners' argument that the Second Circuit in *Trotman* engaged in such a prolix analysis before finding immunity for that interstate agency is simply wrong.

Eleventh Amendment immunity if no such immunity exists.

All persuasive authority concurs with the immunity found below.

B. Even Disregarding Prevailing Precedent Does Not Aid Petitioners. The Nature Of The Compact Warrants Eleventh Amendment Immunity For TRPA.

It does not require great sophistication to conclude that an agency created by separate sovereign states because of their inability to individually solve compact goals results in an offspring which, within its sphere of influence, is greater than or at least tantamount to its creators. To be sure, states "create" local entities exercising a small slice of governmental authority not subject to Eleventh Amendment immunity. *Moor v. County of Alameda*, 411 U.S. 693, 717 (1973). Each such entity, however, exercises wholly intrastate authority; authority theretofore exclusively within the purview of the state (or a *state created* predecessor). The manifest distinction at bar, however, is that neither state had authority over or control of the area now subject to control of this compact created offspring.

> "Legislation is the answer, and legislation must be coterminous with the region requiring control . . . The regions are less than the nation and greater than any one State. The mechanism of legislation must therefore be greater than that at the disposal of a single state." Frankfurter & Landis, *"The Compact Clause of the Constitution—A Study In Interstate Adjustments"*, 34 Yale L.J. 684, 707 (1925).

Agency v. Jennings, District of Nevada No. 78-1160 (presently before the Ninth Circuit). Nor is there any dearth of state court characterizations of the Compact and its offspring. *List v. County of Douglas*, 90 Nev. 272, 524 P. 2d 1271 (1974) and *Younger v. County of El Dorado*, 5 Cal. 3d 480, 487 P. 2d 1193 (1971).

As noted by the opinion's reference to the Eighth Circuit opinion in *Petty*, the critical elements relied upon in *Petty* as affording Eleventh Amendment immunity exist with respect to TRPA. So, a majority vote of the members from each state is required for TRPA to take action [Compact, Article III(g); *Younger v. TRPA, supra*]. Substantial appointment powers of board members are reserved to each respective state [Compact, Article III]. Most of TRPA's funding comes from state and Federal government, and even the amount required of local government [Compact, Article VII] is imposed upon local government by state action of Compact adoption. *Younger v. County of El Dorado, supra.* Finally, and perhaps most importantly (such was treated as the only basis for affording immunity to the compact agency in *Trotman, supra*) the treasuries of the respective states are ultimately accountable for monetary relief against TRPA. NRS 41.035(9) and *Williams v. Horvath*, 16 Cal. 3d 834 (1976).

The opinion of the Second Circuit in *Trotman* is not alone in its observation that, regardless of the names of the parties, Eleventh Amendment immunity extends to *any* entity or individual when the monetary

recovery, if any, comes from state funds. In *Edelman v. Jordan*, 415 U.S. 651 (1973) this Court states the identical rule.

> "Thus, the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment." *Id.*, 415 U.S. at 663.[6]

All of the elements necessary to afford Eleventh Amendment immunity to TRPA pursuant to the rationale of the Eighth Circuit in *Petty* are present. Appellants purport to find some comfort in arguing one Compact provision makes TRPA more "local" than "state". Petitioners rely on Compact language that, for limited purposes, TRPA is deemed a political subdivision of *both* states [Compact, Article VI(b)].[7] How TRPA's having a foot in both states (not *one* state) aids petitioners' argument is unclear. Certainly, an agency partaking of *two* states has immunities greater than or at least equal to the immunity afforded a single state.

Petitioners attempt to construe some of TRPA's functions and areas of influence as similar to functions and influences traditionally those of local, rather than state, government. Laboring under their analogy, petitioners desire TRPA stripped of Eleventh Amend-

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[6]The exception to this rule does not apply herein. [*Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976)] as the silence of the Petition eloquently attests.

[7]Petitioners' argument that this Compact provision makes TRPA a political subdivision of *each* state for *all* purposes is contrived at best. See generally pp. 22-24, *infra*.

ment immunity because *some* of its attributes are *traditionally* more local than state.[8]

Labels such as "local", "state" or "national" do not illuminate. No authority supports utilizing such characterizations as an *ipse dixit* formula for determining immunity. Moreover, such labels fail to recognize that changing circumstances alter the area of concern.

> ". . . [F]rom time to time what was of local concern, and therefore wisely left to local action, becomes a national concern vindicated through national regulation." Frankfurter & Landis, *supra*, 39 Yale L.J. at 724.[9]

And, it was precisely the inability of local government and the impotence of the states acting alone to deal with Tahoe's problems which resulted in a non-local approach through TRPA. *Younger v. County of El Dorado, supra*, 5 Cal. 3d at 495 (footnote 16).

> "The water that the Agency is to purify cannot be confined within one county or state; it circulates freely throughout Lake Tahoe. The air which the Agency must preserve from pollution knows no political boundaries. The wildlife which the Agency should protect ranges freely from one local jurisdiction to another. Nor can the population and explosive development which threaten the region be contained by any of the local authorities which govern parts of the Tahoe Basin. Only an agency transcending local boundaries can devise, adopt and put into operation solutions for the problems besetting the region as a whole." *Id.*, 5 Cal.3d at 494-495.

[8]Petitioners' "tradition" is no more than that. Similar, albeit less comprehensive, functions as those of TRPA are performed by state government rather than local government (e.g., § 30300, California Public Resources Code).

[9]See, also, *Dyer v. Sims*, 341 U.S. 22, 26 (1950), in which this Court, with considerable prescience, observed that the "local" concern of water pollution "might, on occasion, be an appropriate subject for national legislation".

Not only does petitioners' analogy fail, but it is clear that even if the analogy were pursued, TRPA is far more than a local government. *Id.* and *League to Save Lake Tahoe v. TRPA*, 507 F.2d 517, 524 (9th Cir. 1974) cert. den. 420 U.S. 974.

> ". . . [I]nterstate compacts frequently involve not only local concerns of the states involved, but also important national interests. *Dyer v. Sims, supra*, 341 U.S. at 27. See also *Petty, supra*, 359 U.S. at 282, n. 1. The instant Compact deals with much more than mere local concerns such as zoning and land use. It addresses the environmental problems of an area not subject to the control of a single state." *Id.*

Petitioners' attempt to give TRPA a local rather than state character is belied by the Compact, authority construing the Compact and reality. It has taken separate actions by each state before their respective Supreme Courts merely to obtain local government's grudging compliance with the Compact. *Younger v. County of El Dorado, supra,* and *List v. County of Douglas, supra.* Eleventh Amendment immunity for TRPA is appropriate.

2. THE COMPACT DOES NOT WAIVE ELEVENTH AMENDMENT IMMUNITY

Relying upon the opinion of this Court in *Petty v. Tennessee-Missouri Bridge Commission*, petitioners urge that the Compact waives TRPA's Eleventh Amendment immunity.[10]

In *Petty*, this Court found Eleventh Amendment immunity waived because the states accepted and acted upon a condition of Congress attached to its ratification of that compact authorizing federal court suit. Said condition provides:

> "That nothing herein contained shall be construed to affect, impair, or diminish any right, power, or *jurisdiction* of the United States or of any *court*, department, board, bureau, officer, or official of the United States, over or in regard to any navigable waters or any commerce between the states or with foreign countries, or any bridge, railroad, highway, pier, wharf, or other facility or improvement, or any other person, matter, or thing, forming the subject matter of the aforesaid compact or agreement or otherwise affected by the terms thereof." 63 Stat. 930 [emphasis supplied].

Conspicuously absent from the Tahoe Regional Planning Compact is any similar Congressional condition of approval. Indeed, the conditions of approval attached by Congress herein appear to be drafted in

[10]Curiously, petitioners contend that the opinion below erred in finding no waiver of immunity only as to TRPA. No such argument is proffered as to the states. Petitioners have a difference without a distinction.

specific avoidance of the provisions held to waive Eleventh Amendment immunity in *Petty*. [See §§ 2 through 7 of Public Law 91-148, 83 Stat. 360.]

The absence of the very element relied upon by this Court to find a waiver of immunity in *Petty* was noted by the Ninth Circuit as follows:

> "The difference between *Petty* and this case is that in *Petty*, Congress attached a proviso that proved critical to the Supreme Court's determination that the states had waived immunity to suit against the bi-state corporation. The Court observed that
>
> '[I]f there be doubt as to the meaning of the sue-and-be-sued clause in the setting of the compact prior to approval by Congress, the doubt dissipates when the condition [abrogating immunity] attached by Congress is accepted and acted upon by the two States.' 359 U.S. at 281-82.

Discussing *Petty* in *Edelman v. Jordan, supra,* the Supreme Court emphasized that

> 'The question of waiver or consent under the Eleventh Amendment was found in [*Petty*] to turn on whether Congress had intended to abrogate the immunity in question, and whether the State by its participation in the program authorized by Congress had in effect consented to the abrogation of that immunity.' 415 U.S. at 672.

Appellants have pointed to no similar, express proviso attached by Congress when it approved the Compact. Thus, of there has been a waiver, it must be found in the language of the Compact

itself." [Appendix A, pp. 11-12; footnotes deleted.]

Petitioners acknowledge the applicability of the familiar rule that waiver of Eleventh Amendment immunity will be found only where express language or overwhelming implications direct. *Great Northern Life Insurance Co. v. Read*, 322 U.S. 47, 54 (1944) and *Edelman v. Jordan, supra,* 415 U.S. at 673. Nonetheless, and even in the face of Congressional conditions apparently intentionally drafted to avoid the waiver effect of the consent condition in *Petty*, petitioners suggest that waiver lurks somewhere in the Compact.

At oral argument hereinbelow, petitioners urged that the use of the term "federal court" in Article VI(b) waives Eleventh Amendment immunity. That Article reads:

> "All ordinances, rules, regulations and policies adopted by the agency shall be enforced by the agency and by the respective states, counties, and cities. The appropriate courts of the respective states, each within its limits of territory and subject matter provided by state law, are vested with jurisdiction over civil actions to which the agency is a party and criminal actions for violations of its ordinances. Each such action shall be brought in a court of the state where the violation is committed or where the property affected by a civil action is situated, unless the action is brought in a federal court. For this purpose, the agency shall be deemed a political subdivision of both the State of California and the State of Nevada."

The structure and placement of this provision in the Compact are noteworthy. It is placed in an article encaptioned "Agency Powers". Analysis of the eleven paragraphs of that Article reveals that the title is descriptive. If, indeed, the provision quoted was intended to waive Eleventh Amendment immunity, it is out of context.

That Article VI(b) deals with TRPA authority rather than waiving TRPA immunity is equally apparent from its structure. The first sentence authorizes enforcement of TRPA regulations by TRPA and all pertinent governments. The second and third sentences thereof vest state courts with jurisdiction over such actions and contain venue provisions. The paragraph concludes that "for this purpose" TRPA is deemed a subdivision of both states. At the end of the state court venue provisions appear the words: "unless the action is brought in a federal court".

We do not quarrel with the observation that "for this purpose" is vague. Further, we concede that "this purpose" appears to deal with purposes of suit. We are unwilling to agree, however, that, as petitioners would have it, "this purpose" *must be* only for purposes of suit in federal court and that, therefore, this vague phrase waives Eleventh Amendment immunity. "This purpose" more logically relates to the state court venue provisions of the preceding two sentences. Moreover, since the predicate sentence of Article VI(b) deals with enforcement actions, the litigation "purposes" referenced most likely deal with the dif-

fering treatment accorded such actions by the courts of each state."

The most reasonable construction of Article VI(b) is that it grants state courts jurisdiction over TRPA, sets state venue, and deems TRPA an entity of both states for litigation purposes (e.g., venue and bonds). The reference to "federal court", rather than being an obtuse waiver of immunity and delegation of jurisdiction, most logically relates to the propriety of *TRPA* filing suit in federal court (the "enforcement" tenor of the language strongly supports such construction) and to actions exempt from Eleventh Amendment immunity (see Footnote 17 of the opinion hereinbelow and *Fitzpatrick v. Bitzer, supra*).

Neither the body of the Compact as adopted by the states nor the conditions imposed by Congress present the clear and unequivocal waiver of Eleventh Amendment immunity required by law.

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3. THE INDIVIDUAL DEFENDANTS ARE ABSOLUTELY IMMUNE FROM LIABILITY FOR THEIR LEGISLATIVE ACTS.

Petitioners' critique of the Court of Appeals' ruling that the individual defendants are immune from damage suits arising from their legislative acts again shipwrecks on its characterization of TRPA. So, petitioners urge, that if they may characterize TRPA

"For example, bond requirements for governments ancillary to injunctions (which is the typical enforcement remedy) vary between the states [§ 529 California Code of Civil Procedure; Rule 65(c) NRCP]. Consequently, for this litigation "purpose" it is important that TRPA be a political subdivision of both states.

as a local government, such immunity was improvidently afforded. As noted above, however,[12] courts have consistently rejected petitioners' characterization of TRPA.

> "The [Tahoe Regional Planning] Compact deals with much more than local concerns such as zoning and land use. It addresses the environmental problems of an area not subject to the control of a single state." *League to Save Lake Tahoe v. TRPA, supra*, 507 F. 2d at 524.
>
> "Only an agency transcending local boundaries can devise, adopt and put into operation solutions for the problems besetting the region as a whole." *Younger v. County of El Dorado, supra*, 5 Cal. 3d at 495.
>
> "California makes a critical error in likening the Compact to ordinary zoning legislation and TRPA to a typical zoning board." *Younger v. TRPA, supra*, 516 F. 2d at 218.

The comparable bodies to TRPA, as noted by the Court of Appeals, are the state legislatures. Accordingly, consistent with prior authority of this Court, absolute immunity was accorded. *Doe v. McMillan*, 412 U.S. 306 (1973) and *Tenney v. Brandhove*, 341 U.S. 367 (1951).

Petitioners' authorities on the scope of legislative immunity all concern governmental entities and officers distinct from the judicial constructions of the Compact and TRPA. None involve purely legislative acts. None involve legislative entities over a region

[12] Pages 17-19, *supra*, completely rebut petitioners' characterizations of TRPA.

not encompassed within one state. None involve compacts or compact created entities. None are applicable.

The decisions of this Court regarding legislative immunity deal with the nature of legislators *not* whether the particular legislation reflects some "local" concerns. Manifestly, neither Congressional nor state legislative immunity magically disappear when the legislation has "local" impacts. *Tenney v. Brandhove, supra.* Nor should members of the interstate TRPA, an entity consistently judicially characterized contrary to petitioners' labels, be denied immunity merely because their interstate legislation may have local impacts.

CONCLUSION

The judgment and opinion hereinbelow correspond with pertinent authority and present issues neither novel nor of great public significance. The petition is appropriately denied.

Dated, May 17, 1978.

Respectfully submitted,

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